



OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

29 CFR Part 2204

Rules Implementing the Equal Access to Justice Act

AGENCY: Occupational Safety and Health Review Commission.

ACTION: Final rule.

SUMMARY: The Occupational Safety and Health Review Commission (“OSHRC”) is amending its procedural rules implementing the Equal Access to Justice Act (“EAJA”). The amendments closely conform with new model rules from the Administrative Conference of the United States.

DATES: Effective [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

FOR FURTHER INFORMATION CONTACT: Carter Tellinghuisen, Attorney-Advisor, Office of the General Counsel, by telephone at (202) 606-5410 ext. 211, by email at ctellinghuisen@oshrc.gov, or by mail at 1120 20th Street NW, Ninth Floor, Washington, DC 20036-3457.

SUPPLEMENTARY INFORMATION: OSHRC published a notice of proposed rulemaking on March 8, 2021, 86 FR 13251, which announced revisions to the Commission’s rules of procedure implementing EAJA, 29 CFR part 2204, and invited interested persons to submit written comments. OSHRC received no public comments. Accordingly, the Commission now adopts the proposed rule as the agency’s final rule, with one technical amendment to correct a typographical error in § 2204.301(c).

I. Revisions to Part 2204

EAJA directs Federal agencies to consult with the Administrative Conference of the United States (“ACUS”) to develop procedural rules to implement the provisions of the statute. 5 U.S.C. 504(c)(1). On August 8, 2019, ACUS published Revised Model Rules for Implementation of the Equal Access to Justice Act to reflect subsequent amendments to the law

and practice, and to promote greater accuracy and clarity. 84 FR 38934 (August 8, 2019). The Commission is amending its procedural rules in line with the amendments made by ACUS to the model rules.

ACUS summarized and explained its amendments in the preamble to the amended model rules and in Administrative Conference Recommendation 2019–4. 84 FR 38934, 38934 (August 8, 2019); 84 FR 38927, 38933 (August 8, 2019). To the extent applicable, the Commission relies upon the rationale ACUS provided in those documents as the basis for the amendments to the Commission’s rules.

In addition, the Commission has determined that an adjustment for increases in the cost of living is appropriate in considering an applicant’s request for attorney or agent fees.

Accordingly, pursuant to 5 U.S.C. 504(b)(1)(A), the Commission revises §§ 2204.303 and 2204.406(c)(2) to allow an applicant to request, with supporting documentation, an increase in hourly fees to account for inflation as measured by the consumer price index in the relevant locality.

II. Statutory and Executive Order Reviews

Executive Orders 12866 and 13132, and the Unfunded Mandates Reform Act of 1995:

The Review Commission is an independent regulatory agency and, as such, is not subject to the requirements of E.O. 12866, E.O. 13132, or the Unfunded Mandates Reform Act, 2 U.S.C. 1501 *et seq.*

Regulatory Flexibility Act: Pursuant to 5 U.S.C. 605(a), a regulatory flexibility analysis is not required because these rules concern “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice” under 5 U.S.C. 553(b).

Paperwork Reduction Act of 1995: The Review Commission has determined that the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, does not apply because these rules do not contain any information collection requirements that require the approval of the Office of Management and Budget (OMB).

Congressional Review Act: These revisions do not constitute a “rule,” as defined by the Congressional Review Act, 5 U.S.C. 804(3)(C), because they involve changes to agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties.

List of Subjects in 29 CFR Part 2204

Administrative practice and procedure, Equal access to justice.

For the reasons set forth in the preamble, the Review Commission revises 29 CFR part 2204 to read as follows:

PART 2204—IMPLEMENTATION OF THE EQUAL ACCESS TO JUSTICE ACT IN PROCEEDINGS BEFORE THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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Authority: 5 U.S.C. 504.

Subpart A – General Provisions

§ 2204.101 Scope of this part.

The Equal Access to Justice Act, 5 U.S.C. 504 (called “EAJA” in this part), provides for the award of attorney or agent fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (called “adversary adjudications”) before the Occupational Safety and Health Review Commission. An eligible party may receive an award when it prevails over the Secretary of Labor, unless the Secretary's position in the proceeding was substantially justified or special circumstances make an award unjust. Alternatively, an eligible party, even if not a prevailing party, may receive an award under 5 U.S.C. 504(a)(4) when it successfully defends against an excessive demand made by the Secretary.

Subpart B – Definitions

§ 2204.201 Definitions.

For the purposes of this part:

Adversary adjudication means an adjudication under 5 U.S.C. 554 and 29 U.S.C. 659(c) in which the position of the Secretary is represented by counsel or otherwise, subject to certain exclusions set forth in 5 U.S.C. 504(b)(1)(C).

Agent means any person other than an attorney who represents a party in a proceeding before the Commission pursuant to § 2200.22 of this chapter.

Commission means the Occupational Safety and Health Review Commission.

Demand means the express demand of the Secretary which led to the adversary adjudication, but does not include a recitation by the Secretary of the maximum statutory penalty:

- (1) In the administrative complaint; or
- (2) Elsewhere when accompanied by an express demand for a lesser amount.

Excessive demand means a demand by the Secretary, in an adversary adjudication arising from the Secretary's action to enforce a party's compliance with a statutory requirement that is substantially in excess of the decision of the judge or Commission and is unreasonable when compared with such decision, under the facts and circumstances of the case.

Final disposition means the date on which a decision or order disposing of the merits of the adversary adjudication or any other complete resolution of the adversary adjudication, such as a settlement or voluntary dismissal, become final and unappealable, both within the agency and to the courts.

Judge means the Administrative Law Judge appointed under 29 U.S.C. 661(j) who presided over the adversary adjudication or presides over an EAJA proceeding.

Party means a party, as defined in 5 U.S.C. 551(3), who is:

- (1) An individual whose net worth did not exceed \$2,000,000 at the time the adversary adjudication was initiated; or
- (2) Any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed \$7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act, may be a party regardless of the net worth of such organization or

cooperative association. For purposes of 5 U.S.C. 504(a)(4), “party” also includes a small entity as defined in 5 U.S.C. 601.

Position of the Secretary means, in addition to the position taken by the Secretary in the adversary adjudication, the action or failure to act by the Secretary upon which the adversary adjudication is based, except that fees and other expenses may not be awarded to a party for any portion of the adversary adjudication in which the party has unreasonably protracted the proceedings.

Secretary means the Secretary of Labor.

Subpart C – EAJA Application

§ 2204.301 Application requirements.

(a) A party seeking an award under EAJA shall file an application with the judge that conducted the adversarial adjudication within 30 days after the final disposition of the adversary adjudication.

(b) The application shall identify the applicant and the proceeding for which an award is sought. The application shall show that the applicant has prevailed and identify the position of the Secretary that the applicant alleges was not substantially justified; or, if the applicant has not prevailed, shall show that the Secretary’s demand was substantially in excess of the decision of the judge or Commission and was unreasonable when compared with that decision under the facts and circumstances of that case. The application shall also identify the Secretary’s position(s) in the proceeding that the applicant alleges was (were) not substantially justified or the Secretary’s demand that is alleged to be excessive and unreasonable. Unless the applicant is an individual, the application shall also state the number of employees of the applicant and briefly describe the type and purpose of its organization or business.

(c) The application shall also show that the applicant meets the definition of “party” in § 2204.201, including adequate documentation of its net worth, as set forth in § 2204.302.

(d) The application shall state the amount of fees and expenses for which an award is sought, subject to the requirements and limitations as set forth in 5 U.S.C. 504(b)(1)(A), with adequate documentation as set forth in § 2204.303.

(e) The application shall be signed by the applicant or an authorized officer, attorney, or agent of the applicant. It shall also contain or be accompanied by a written verification under penalty of perjury that the information provided in the application is true and correct.

§ 2204.302 Net worth exhibit.

(a) Each applicant except a qualified tax-exempt organization, cooperative association, or, in the case of an application for an award related to an allegedly excessive demand by the Secretary, a small entity as that term is defined by 5 U.S.C. 601(6), shall provide with its application a detailed exhibit showing the net worth of the applicant as required by § 2204.301(c) when the proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's assets and liabilities and is sufficient to determine whether the applicant qualifies under excessive demand as defined in § 2204.201. The judge or Commission may require an applicant to file additional information to determine its eligibility for an award.

(b) Ordinarily, the net worth exhibit will be included in the public record of the proceeding. However, an applicant that objects to public disclosure of information in any portion of the exhibit and believes there are legal grounds for withholding it from disclosure may request that the documents be filed under seal or otherwise be treated as confidential, pursuant to §§ 2200.8 and 2200.52 of this chapter.

§ 2204.303 Documentation of fees and expenses.

The application shall be accompanied by adequate documentation of the fees and other expenses incurred after the initiation of the adversary adjudication, including, but not limited to, the reasonable cost of any study, analysis, engineering report, test, or project. An application seeking an increase in fees to account for inflation pursuant to § 2200.406 of this chapter shall

also include adequate documentation of the change in the consumer price index for the attorney or agent's locality. With respect to a claim for fees and expenses involving an excessive demand by the Secretary, the application shall be accompanied by adequate documentation of such fees and expenses incurred after initiation of the adversary adjudication for which an award is sought attributable to the portion of the demand alleged to be excessive and unreasonable. A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided. The judge or Commission may require the applicant to provide vouchers, receipts, or other substantiation for any fees or expenses claimed.

Subpart D – Procedures for Considering Applications

§ 2204.401 Filing and service of documents.

Any application for an award, or any accompanying documentation related to an application shall be filed and served on all parties to the proceeding in accordance with §§ 2200.7 and 2200.8 of this chapter, except as provided in § 2204.302(b) for confidential financial information.

§ 2204.402 Answer to application.

(a) Within 30 days after service of an application, the Secretary shall file an answer to the application. Unless the Secretary requests an extension of time for filing or files a statement of intent to negotiate under paragraph (b) of this section, failure to file an answer within the 30-day period may be treated as a consent to the award requested.

(b) If the Secretary and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this

statement shall extend the time for filing an answer for an additional 30 days, and further extensions may be granted by the judge upon request.

(c) The answer shall explain in detail any objections to the award requested and identify the facts relied on in support of the Secretary's position. If the answer is based on any alleged facts not already in the record of the proceeding, the Secretary shall include with the answer either supporting affidavits or a request for further proceedings under § 2204.405.

§ 2204.403 Reply.

Within 15 days after service of an answer, the applicant may file a reply. If the reply is based on any alleged facts not already in the record of the proceeding, the applicant shall include with the reply either supporting affidavits or a request for further proceedings under § 2204.405.

§ 2204.404 Settlement.

The applicant and the Secretary may agree on a proposed settlement of the award before final action on the application, either in connection with a settlement of the underlying adversary adjudication, or after the adversary adjudication has been concluded, in accordance with the Commission's standard settlement procedures as set forth in § 2200.120 of this chapter. If a prevailing party and the Secretary agree on a proposed settlement of an award before an application has been filed, the application shall be filed with the proposed settlement. If a proposed settlement of an underlying proceeding provides that each side shall bear its own expenses and the settlement is accepted, no application may be filed.

§ 2204.405 Further proceedings.

(a) Ordinarily, the determination of an award will be made on the basis of the written record. However, on request of either the applicant or the Secretary, or on his or her own initiative, the judge presiding over an EAJA proceeding may, if necessary for a full and fair decision on the application, order the filing of additional written submissions; hold oral argument; or allow for discovery or hold an evidentiary hearing, but only as to issues other than whether the agency's position was substantially justified (such as those involving the applicant's

eligibility or substantiation of fees and expenses). Any written submissions shall be made, oral argument held, discovery conducted, and evidentiary hearing held as promptly as possible so as not to delay a decision on the application for fees. Whether or not the position of the Secretary was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

(b) A request for further proceedings under this section shall specifically identify the information sought or the disputed issues and shall explain why the additional proceedings are necessary to resolve the issues.

§ 2204.406 Decision.

The preparation and issuance of decision on the fee application shall be in accordance with § 2200.90 of this chapter.

(a) *For an application involving a prevailing party.* The decision shall include written findings and conclusions on the applicant's eligibility and status as a prevailing party and an explanation of the reasons for any difference between the amount requested and the amount awarded. The decision shall also include, if applicable, findings on whether the Secretary's position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust.

(b) *For an application involving an allegedly excessive agency demand.* The decision shall include written findings and conclusions on the applicant's eligibility and an explanation of the reasons why the agency's demand was or was not determined to be substantially in excess of the underlying decision in the matter and whether the Secretary's demand was or was not unreasonable. That determination shall be based upon all the facts and circumstances of the case.

(c) *Awards.* The judge presiding over an EAJA proceeding or the Commission on review may reduce the amount to be awarded, or deny any award, to the extent that the party during the

course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

(1) Awards shall be based on rates customarily charged by persons engaged in the business of acting as attorneys, agents and expert witnesses, even if the services were made available without charge or at a reduced rate to the applicant.

(2) An award for the fee of an attorney or agent under this paragraph (c) shall not exceed the hourly rate specified in 5 U.S.C. 504(b)(1)(A), except to account for inflation since the last update of the statute's maximum award upon the request of the applicant as documented in the application pursuant to § 2204.303. An award to compensate an expert witness shall not exceed the highest rate at which the Secretary pays expert witnesses. However, an award may include the reasonable expenses of the attorney, agent or witness as a separate item, if the attorney, agent or witness ordinarily charges clients separately for such expenses.

(3) In determining the reasonableness of the fee sought for an attorney, agent, or expert witness, the following shall be considered:

(i) If the attorney, agent, or witness is in private practice, his or her customary fee for similar services, or, if an employee of the applicant, the fully allocated cost of the services;

(ii) The prevailing rate for similar services in the community in which the attorney, agent, or witness ordinarily perform services;

(iii) The time actually spent in the representation of the applicant;

(iv) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

(v) Such other factors as may bear on the value of the services provided.

(4) The reasonable cost of any study, analysis, engineering report, test, project, or similar matter prepared on behalf of the party may be awarded, to the extent that the charge for the service does not exceed the prevailing rate for similar services, and the study or other matter was necessary for preparation of the applicant's case.

§ 2204.407 Commission review.

Either the applicant or the Secretary may seek review of the judge's decision on the fee application, and the Commission may grant such a petition for review or direct review of the decision on the Commission's own initiative. Review by the Commission shall be in accordance with §§ 2200.91 and 2200.92 of this chapter.

§ 2204.408 Judicial review.

Judicial review of final decisions on awards may be sought as provided in 5 U.S.C. 504(c)(2).

§ 2204.409 Stay of decision concerning award.

Any proceedings on an application for fees under this part shall be automatically stayed until the adversary adjudication has become a final disposition.

§ 2204.410 Waiver.

After reasonable notice to the parties, the judge or the Commission may waive, for good cause shown, any provision contained in this part as long as the waiver is consistent with the terms and purpose of the EAJA.

§ 2204.411 Payment of award.

An applicant seeking payment of an award shall submit to the officer designated by the Secretary a copy of the Commission's final decision granting the award, accompanied by a certification that the applicant will not seek review of the decision in the United States courts.

Cynthia L. Attwood,

Chairman.

Amanda Wood Laihow,

Commissioner.

